(3)

No. 84-1513

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1984

THE PEOPLE OF THE STATE OF CALIFORNIA

Petitioner,

v.

DANTE CARLO CIRAOLO,

Respondent.

PETITIONER'S REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I

CIRAOLO'S ARGUMENT REFLECTS THE DISHARMONY OF THE CALIFORNIA COURT'S DECISION WITH THIS COURT'S CASES AND REINFORCES THE URGENT NEED FOR RESOLUTION OF THE NATIONALLY IMPORTANT ISSUE OF AERIAL OBSERVATION

Respondent Ciraolo fails to reconcile the California Court of Appeal's judgment with such cases as

United States v. Bassford, 601 F.Supp. 1324 (D. Maine 1985) cited in the petition. Indeed, he cannot. He merely renders explicit that implicit in the decision: a holding that police cannot intentionally change their position to see into a repository for contraband that the possessor knowingly exposed to view by the public. Respondent's illumination reinforces the need for plenary review by highlighting the disharmony between the California judgment and this Court's Fourth Amendment privacy principles. (See, e.g., Texas v. Brown, 460 U.S. 730, 740 (1983); United States v. Knotts, 460 U.S. 276, 282 (1983); United States v. Ross, 456 U.S. 798, 822-823 (1982); United States v. Lee, 274 U.S. 559, 563 (1927).)

Two matters noted by respondent may, however, mistakenly lead this Court to underestimate the need for review. First,

the preliminary injunction granted in NORML v. Mullen, ___ F.Supp. ___ (No. 83-4037 RPA) (N.D. Cal. 1985) has recently been modified by the Court of Appeals for the Ninth Circuit on its understanding that the District Court meant only to enjoin deliberately low helicopter flights over private residences. The modification enjoins "deliberate, knowing and intentional helicopter flights under 500 feet over residential structures, persons and vehicles." (NORML v. Mullen, No. 85-1883 (9th Cir. 1985) [Order of April 19, 1985, granting emergency motion in part].) If review is denied, California will be precluded by the state judgment from making aerial observations authorized by the federal injunction.

Second, the California Supreme Court overflight cases cited by respondent (Opp. 12) are but two of nine

pending cases which, unlike this case, involve offenses committed prior to June 9, 1982. Effective that day, the People added, by initiative, article I, section 28(d) to the California Constitution, precluding reliance on state search and seizure law to suppress evidence of offenses committed after that date. (In re Lance W., 37 Cal.3d 873, 210 Cal.Rptr. 631, 694 P.2d 744, mod. 38 Cal.3d 412a, ___ Cal.Rptr. ___, ___ P.2d ___ (1985); see People v. Smith, 34 Cal.3d 251, 193 Cal.Rptr. 692, 667 P.2d 149 (1983).) Plenary resolution now by this Court of the federal issue must govern the California Supreme Court, but that court's rendition of state law cannot affect this case or future cases.

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II

THE STATE COURT PROCEEDINGS CONTAIN A FULLY DEVELOPED RECORD ON THE GOOD FAITH ISSUE BRIEFED IN AND DECIDED ON THE MERITS BY THE CALIFORNIA COURT OF APPEAL

Respondent Ciraolo perceives the good faith issue to be "[w]hether the officer who flew over respondent's home . . . knew that the curtilage was protected by the Fourth Amendment . . ." (Opp. 12). Expanding application of United States v. Leon, 468 U.S. ___, 82 L.Ed.2d 677, 104 S.Ct. 3405 (1984) to warrantless searches, he argues, should require testimony on good faith in the trial court as a prudential predicate.[1/]

Respondent's fallacy is that the officer's good faith in conducting the overflight is not the issue. As framed

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1. Respondent cannot and does not challenge the jurisdiction of this Court. (See, Jenkins v. Georgia, 418 U.S. 153, 157 (1974).)

by the petition and decided by the California court, it is whether Leon has facial application to a judicial warrant based on probable cause, subsequently deemed the product of an illegal search, fully disclosed to the issuing magistrate.

The record in this case contains all facts pertinent to the issue: (1) a search warrant affidavit detailing the overflight operation so that all information cited by the California Court of Appeal as indicative of its purported illegality was disclosed to the magistrate (CT 36-40), (2) a search warrant based on that information (CT 34-35), and (3) evidence seized pursuant to the warrant (CT 5-6, 8, 17), all three of which were before the state trial court at the suppression hearing (RT [Aug. 15, 1983]:4-5). The decisional law at the time of the warrant is, of course, judicially noticeable.

Reasoned application, not expansion, of Leon is sought. No prudential reason exists to defer it. Moreover, it would be grossly unfair to deny California review on the asserted ground. Leon did not exist at the time of respondent's conviction. Testimony by the officer on good faith is not only extraneous to the question decided by the California court, it was almost certainly inadmissibly irrelevant in the trial court absent any good faith doctrine. (See, Illinois v. Gates, 462 U.S. 213 (1983); People v. Teresinski, 30 Cal.3d 822, 831, fn. 6, 180 Cal.Rptr. 617, 622, fn. 6, 640 P.2d 753, 758, fn. 6 (1982)

The question is one of law, not dependent on the officer's state of mind or legal knowledge. Indeed, Leon eschews the very inquiry suggested as a misallocation of judicial resources.

(United States v. Leon, supra, 468 U.S. at ___, 82 L.Ed.2d at 698, fn. 23, 104 S.Ct. at 3421, fn. 23.) Review, under Leon, should not be refused due to the absence of the unnecessary. (United States v. Hendricks, 743 F.2d 653, 656 (9th Cir. (1984), cert. denied, ___ U.S. ___, 84 L.Ed.2d 382, 105 S.Ct. 1362 (1985); United States v. Sager, 743 F.2d 1261, 1265-1266 (8th Cir. 1984), cert. denied, ___ U.S. ___, 84 L.Ed.2d 341, 105 S.Ct. 1196 (1985).)

Respondent's reliance on Illinois v. Gates, supra, 462 U.S. 213 is misplaced. In Gates, the State of Illinois never raised modification of the exclusionary rule in the state courts and none considered it. This Court anticipated that testimony on subjective good faith might be significant. Those considerations are absent here. Instead, it is the California court's grudging interpretation

of Leon which controls and requires review.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

DATED: May 16, 1985

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CERTIFICATE OF SERVICE BY MAIL

PEOPLE OF THE STATE OF CALIFORNIA,	)	
Petitioner,	)	
v.	)	No. 84-1513
DANTE CARLO CIRAOLO,	)	
Respondent.	)	

State of California)
)
City and County of)
San Francisco)

LAURENCE K. SULLIVAN, a member of the Bar of the Supreme Court of the United States, being duly sworn, deposes and states:

That his business address is 6000 State Building in the City and County of San Francisco, State of California; that on May 15, 1985 true copies of the attached Petitioner's Reply to Opposition to Petition for Writ of Certiorari in the above-entitled matter were served on counsel of record by

placing same in envelope addressed as follows:

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Said envelopes were then sealed and deposited in the United States mail at San Francisco, California with first class postage thereon fully prepaid.

Laurence K. Sullivan

LAURENCE K. SULLIVAN
Deputy Attorney General

Dated: May 16, 1985

Joan Chiccarella
(NOTARY PUBLIC)

Notary Public in and for the State of California, City and County of San Francisco, personally appeared LAURENCE K. SULLIVAN, known to me to be the person whose name is subscribed to the within instrument, and acknowledged that he executed the same.

JOAN CHICCARELLA
NOTARY PUBLIC - CALIFORNIA
COUNTY OF SAN FRANCISCO
My commission expires Feb. 8, 1988